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**Datasheet for the decision
of 11 February 2010**

Case Number: T 2254/08 - 3.2.07

Application Number: 03735804.1

Publication Number: 1511677

IPC: B65D 41/62

Language of the proceedings: EN

Title of invention:

Liquid container closure assembly

Patentee:

Guala Closures Patents B.V.

Opponents:

Inostrannoye Unitarnoye Proizvodstvennoye Predpriyatiye
"Belkeps"
Compania de Tapones Irrellenables, S.A.
Dheber Technologies Diffusion S.R.L.

Headword:

-

Relevant legal provisions:

EPC Art. 54, 56, 128(4)
EPC R. 144

Relevant legal provisions (EPC 1973):

-

Keyword:

"Request to remove documents from file inspection: not allowed"
"Novelty: yes (all requests)"
"Inventive step: no (main and first to fourth auxiliary requests), yes (fifth auxiliary request)"

Decisions cited:

-

Catchword:

-



Case Number: T 2254/08 - 3.2.07

DECISION
of the Technical Board of Appeal 3.2.07
of 11 February 2010

**Appellant/
Opponent 01:** Inostrannoye Unitarnoye Proizvodstvennoye
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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted
8 October 2008 concerning maintenance of the
European patent No. 1511677 in amended form.

Composition of the Board:

Chairman: H. Meinders
Members: P. O'Reilly
E. Dufrasne

Summary of Facts and Submissions

- I. Oppositions were filed against European patent No. 1 511 677 as a whole based on Article 100(a) EPC (lack of novelty and lack of inventive step).

The opposition division decided to maintain the patent in amended form in accordance with the second auxiliary request.

- II. The proprietor (hereinafter appellant/proprietor) and opponent 01 (hereinafter appellant/opponent I) each filed an appeal against that decision.

- III. The appellant/proprietor requested that the decision under appeal be set aside and that the patent be maintained as granted or, in the alternative according to one of the first to fourth auxiliary requests filed with letter dated 11 January 2010, or that the appeal of the appellant/opponent I be dismissed or that the patent be maintained on the basis of the sixth auxiliary request, also filed with letter dated 11 January 2010.

The appellant/opponent I requested that the decision under appeal be set aside, that the appeal of the appellant/proprietor be dismissed and that the patent be revoked.

Opponent 02 (hereinafter respondent II) as party as of right, although duly summoned, did not attend the oral proceedings before the Board and in the written proceedings did not make any request.

Opponent 03 (hereinafter respondent III) as party as of right requested that the appeal of the appellant/proprietor be dismissed.

IV. Device claim 1 of the **main request** reads as follows:

"A closure assembly (5) adapted to be applied to a mouth (10) and neck (11) portion of a container (15) for liquid, the closure assembly (5) comprising a sleeve (20) adapted to lie substantially concentrically with respect to the mouth (10) and provided with means for fixing the sleeve (20) on the container (15), the closure assembly (5) further comprising a first outer sleeve (25) coaxially mounted over said sleeve (20) and a second outer sleeve (30) separate from the first outer sleeve and substantially tight fit with a container closure member (35), said first and second outer sleeves being axially aligned and having respective initially adjacent portions, characterized in that there are provided means for spacing apart the initially adjacent portions of the first (25) and second (30) outer sleeves upon reclosure of the assembly after an initial opening of the container."

First auxiliary request

The device claim 1 and method claim 13 of the **first auxiliary request** read as follows (amendments when compared to claim 1 of the main request are depicted in bold):

"1. A closure assembly (5) adapted to be applied to a mouth (10) and neck (11) portion of a container (15) for liquid, the closure assembly (5) comprising a

sleeve (20) adapted to lie substantially concentrically with respect to the mouth (10) and provided with means for fixing the sleeve (20) on the container (15), the closure assembly (5) further comprising a first outer sleeve (25) coaxially mounted over said sleeve (20) and a second outer sleeve (30) separate from the first outer sleeve and substantially tight fit with a container closure member (35), said first and second outer sleeves being axially aligned and having respective initially adjacent portions, characterized in that there are provided means for spacing apart the initially adjacent portions of the first (25) and second (30) outer sleeves upon reclosure of the assembly after an initial opening of the container, **wherein the container closure member (35) includes a circumferential groove (60) which further provides a circumferential lip portion (65) located below and adjacent to the circumferential groove (60), in which the initially adjacent portions comprise adjacent respective circumferential edges (70, 75) of the first (25) and second (30) outer sleeves, wherein the first and second circumferential edges (70, 75) are, prior to initial opening, located in the circumferential groove (60) substantially adjacent one another.**"

"13 **A method of manufacturing** a closure assembly (5) adapted to be applied to a mouth (10) and neck (11) portion of a container (15) for liquid, the closure assembly (5) comprising a sleeve (20) adapted to lie substantially concentrically with respect to the mouth (10) and provided with means for fixing the sleeve (20) on the container (15), the closure assembly (5) further comprising a first outer sleeve (25) coaxially mounted over said sleeve (20) and a second outer sleeve (30)

separate from the first outer sleeve and substantially tight fit with a container closure member (35), said first and second outer sleeves being axially aligned and having respective initially adjacent portions, ~~characterized in that~~ **wherein** there are provided means for spacing apart the initially adjacent portions of the first (25) and second (30) outer sleeves upon reclosure of the assembly after an initial opening of the container, **the method comprising the steps of: (a) providing an outer sleeve member; (b) providing a pouring outlet device and the sleeve (20) adapted to be secured to a mouth and neck portion of a container for liquid and the container closure member (35) releasably securable to the pouring outlet device and/or sleeve; (c) disposing the pouring outlet device, sleeve and container closure member at least partly within the outer sleeve member; (d) forming the outer sleeve member into the first outer sleeve (25) and the separate second outer sleeve (30), by providing a circumferentially cut line (31) which extends 360° around the closure assembly.**"

Second auxiliary request

Method claim 13 of the **second auxiliary request** is the same as method claim 13 of the first auxiliary request. Device claim 1 of this request reads as follows (amendments when compared to claim 1 of the **first auxiliary request** are depicted in bold):

"A closure assembly (5) adapted to be applied to a mouth (10) and neck (11) portion of a container (15) for liquid, the closure assembly (5) comprising a sleeve (20) adapted to lie substantially concentrically

with respect to the mouth (10) and provided with means for fixing the sleeve (20) on the container (15), the closure assembly (5) further comprising a first outer sleeve (25) coaxially mounted over said sleeve (20) and a second outer sleeve (30) separate from the first outer sleeve and substantially tight fit with a container closure member (35), said first and second outer sleeves being axially aligned and having respective initially adjacent portions, characterized in that there are provided means for spacing apart the initially adjacent portions of the first (25) and second (30) outer sleeves upon reclosure of the assembly after an initial opening of the container, wherein the container closure member (35) includes a circumferential groove (60) which further provides a circumferential lip portion (65) located below and adjacent to the circumferential groove (60), in which the initially adjacent portions comprise adjacent respective circumferential edges (70, 75) of the first (25) and second (30) outer sleeves, wherein the first and second circumferential edges (70, 75) are, prior to initial opening, located in the circumferential groove (60) substantially adjacent one another **and wherein said means for spacing apart the initially adjacent portions of the first (25) and second (30) outer sleeves comprise at least the circumferential lip portion (65) of the container closure member (35).**"

Third auxiliary request

Method claim 1 of the **third auxiliary request** is identical to method claim 13 of the **first auxiliary request**.

Fourth auxiliary request

Method claim 1 of the **fourth auxiliary request** is identical to method claim 1 of the **third auxiliary request**. The set of claims of this request does not contain the dependent claims which are part of the set of claims of the **third auxiliary request**.

Fifth auxiliary request

Device claim 1 of the **fifth auxiliary request** is the same as device claim 1 of the **first auxiliary request**. There are no method claims in the set of claims of this request. The claims of this request are the claims maintained in accordance with the decision of the opposition division and it constitutes the appellant/proprietor's request to reject the appeal of appellant/opponent I.

Sixth auxiliary request

Device claim 1 of the **sixth auxiliary request** is the same as device claim 1 of the **second auxiliary request**. There are no method claims in the set of claims of this request.

V. The documents cited in the present decision are the following:

D1: WO-A-02/096771
D2: GB-A-2 158 424
D4: WO-A-02/18224

- D5: WO-A-98/55370 (referred to by the opposition division as D11 and is the application underlying EP-B1-0 988 237 referred to by the opposition division as D5)
- D13: EP-A-0 574 644
- D14: Guala Closures S.p.A. Global offering of 36,579,000 Ordinary Shares
- D15a: Pages 59 and 60 of Guala Closures S.p.A. - Offerta Pubblica di Vendita e Sottoscrizione
- D15b: Pages 59 and 60 of Guala Closures - Public Invitation for Bidding and Subscription

VI. The arguments of the appellant/proprietor may be summarised as follows:

(i) D14 should not be open to file inspection, as it is clearly marked on the document that it is confidential. Disclosure of this document is prejudicial to the legitimate economic interests of the appellant/proprietor. Also D15a and D15b should not be open to file inspection and should not be admitted into the proceedings as they are late filed and not relevant.

(ii) The information in D14, D15a and D15b regarding the launch date of the closure assembly "Alusnap" is a mistake. As indicated in the declaration of Mr. Thomson such closures were first sold in 2003, not 2001 as indicated in these documents. The drawing in D14 is not a prior disclosure and there is not enough technical information in the document to know what might have been disclosed.

(iii) The subject-matter of claim 1 of the main request is novel over each of D1 and D2.

The device disclosed in D1 does not comprise separate first and second outer sleeves since the portions of the outer sleeve are connected by a frangible portion and hence are not separate.

The device disclosed in D2 has neither a sleeve nor a means of fixing it to the container.

(iv) The subject-matter of claim 1 of the main request involves an inventive step.

The nearest prior art document is D4. The device disclosed in this document has frangible links to provide evidence of tampering. There was a prejudice in the art against providing a form of evidence of tampering which did not involve breaking some part of the device. Even if the skilled person were to take into account the teaching of D2 and apply it to the device known from D4 he would apply the whole teaching and thus arrive at a construction which would be different to that which is claimed. Also, if the skilled person considered D13 he would still provide the frangible portion disclosed therein.

(v) The subject-matter of method claim 13 of the first auxiliary request also involves an inventive step.

The claim includes the method features related to forming the device of claim 1 of the main request and in particular the extra feature that the outer sleeve member is formed into the first and second outer

sleeves by providing a circumferential cut line. The device disclosed in D2 could not be formed using such a cut line so that also a device formed by applying the teaching of D2 to the device known from D4 could not be formed in this way. Also in D5 and D13 there is no disclosure of such a cut line in the devices disclosed therein.

The same applies to the corresponding claims in the second, third and fourth auxiliary requests, which each include this claim in their respective sets of claims.

(vi) The subject-matter of claim 1 as maintained in the impugned decision (fifth auxiliary request) involves an inventive step.

This claim includes the feature that the container closure member includes a circumferential groove in which circumferential edges of the first and second outer sleeves are located substantially adjacent one another prior to initial opening. A groove by its nature has a pair of sidewalls. These sidewalls provide support for the circumferential edges when an initial single outer sleeve is being cut to form the first and second outer sleeves. There is no hint in the prior art to provide such a groove. The device known from D5 may provide a circumferential recess but this recess is not a groove and in any case it cannot provide support for both circumferential edges as it has at most only one sidewall. There is no groove provided in D2 in which circumferential edges are located. The groove formed in the manner suggested by respondent III includes one of the circumferential edges as part of the groove so that

this circumferential edge cannot also be located in the groove.

VII. The arguments of appellant/opponent I may be summarised as follows:

(i) D14, as well as D15a and D15b, should be admitted into the proceedings. Even though it is marked on the document that it is confidential it was made available to an unrestricted public via its publication on the internet and the internet address of the website of the Italian stock exchange on which it was published has been provided. On that web site D15a and D15b were also found. The fact that D14 and D15a were publically accessible is proven by the confirmations of a public notary filed by appellant/opponent I. Since the documents have been available to the public their filing in these proceedings cannot prejudice the economic interests of the appellant/proprietor and thus should not be excluded from file inspection.

(ii) D14, D15a and D15b show that the closure assembly "Alusnap" was launched in 2001. The drawing of the assembly shown in D14 is identical to that of the assembly shown in D1 or in the patent in suit. Both of D1 and the patent in suit indicate that the invention is named Alusnap. Therefore, D14 discloses the invention or at least the device of D1. In response to the question of the Board as to how many components the device of D1 contains, the answer is six including the ball.

(iii) The subject-matter of claim 1 of the main request lacks novelty over D1.

The appellant/proprietor acknowledges that this document discloses all the features of claim 1 except for the feature that the first and second outer sleeves are separate. However, also this feature is disclosed in D1, as the skilled person looking at figure 4 of this document would recognise with respect to the sleeves 10 and 15. This is clear from the way that they are separately indicated in the figure and are drawn with a line of separation. The fact that the skilled person when subsequently reading the description then finds out that this line can be a frangible line does not alter the disclosure of the drawings as such. Therefore, D1 discloses all the features of the assembly of claim 1.

Also, the arguments of respondent III regarding the lack of novelty of the subject-matter of claim 1 over D2 are agreed with.

(iv) The subject-matter of claim 1 of the main request also does not involve an inventive step.

Taking D4 as the closest prior art this document discloses all the features of claim 1 except that it does not disclose means for spacing apart the first and second outer sleeves upon reclosure. The problem to be solved is to provide an improved indication that the closure has already been opened, for which the skilled person would find a solution in D2 which discloses this feature. The skilled person would abandon the frangible portion provided in the device disclosed in D4 because this would become redundant. He would be incited to do this in order to make the opening of the closure

easier. There is no prejudice against providing the two outer sleeve portions as separate portions since this is already the case for the device disclosed in D13.

(v) The subject-matter of method claim 13 of the first auxiliary request does not involve an inventive step.

The skilled person would recognise from figure 5 of D4 that there is a cut line 320 so that this feature cannot contribute to the presence of an inventive step in the subject-matter of the claim. This disclosure in the drawing is independent of the written description of this line indicating a frangible portion since the written description constitutes a separate disclosure.

The same reasoning applies to the corresponding claims in the second, third and fourth auxiliary requests which each include this claim in their respective sets of claims.

(vi) The subject-matter of claim 1 as maintained with the impugned decision (fifth auxiliary request) does not involve an inventive step.

With respect to the feature of this claim that there is a groove with the circumferential edges of the first and second outer sleeves located therein: this feature has no function so that it is just a design concept. In any case such a groove is disclosed in D5 since the cap 3 of the device disclosed in this document has a recess adjacent the collar 30 and a recess is just a form of groove.

VIII. Respondent II did not make any submission.

IX. The arguments of respondent III may be summarised as follows:

(i) The arguments of appellant/opponent I regarding the public access via the internet to D14, D15a and D15b are agreed with.

(ii) D14 shows that the closure assembly "Alusnap" was launched in 2001. The drawing of the device is identical to that of the device shown in D1 or in the patent in suit. Both of these documents indicate that the invention is named Alusnap. In response to the question of the Board as to how many components the device of D1 contains, the answer is six, not including the ball.

(iii) The subject-matter of claim 1 of the main request lacks novelty over D1. It is acknowledged by the appellant/proprietor that this document discloses all the features of claim 1 except for the feature that the first and second outer sleeves are separate. The term "separate", however, includes frangible portions within its scope since the two parts are clearly separated from each other by the frangible portions. They form two parts even before the frangible portions are broken.

The subject-matter of claim 1 of the main request also lacks novelty over the device of D2. The appellant/proprietor disputes that D2 discloses a sleeve provided with means for fixing the sleeve on the container. Such a sleeve, however, is formed by the outer periphery of the first member 4 which has an

axial extent so that it forms a sleeve. The first member and hence also the sleeve is fixed on the container. The fixing means does not have to be part of the sleeve. Also, the feature of the claim that the second outer sleeve is a tight fit with the container closure member is disclosed in this document. The stopper cover 39 is a tight fit on the stopper cap 18 as is visible in figure 8 of D2.

(iv) The subject-matter of claim 1 of the main request does not involve an inventive step.

The arguments of appellant/opponent I are agreed with. In addition, it is pointed out that starting from the device of D4 the skilled person would want to replace the frangible links of the assembly disclosed in D4 because even if these are broken this is not necessarily visible when the outer cap 330 is reclosed as the remains of the broken bridges of the frangible portions could be in alignment with each other.

The skilled person could also start from the device of D2. If the distinguishing feature of claim 1 over the disclosure of this document is the tight fit of the second outer sleeve with the container closure member then the problem to be solved is to simplify the construction of the device disclosed in D2. The solution to the problem is disclosed in D4 which on page 17, lines 3 and 4, refers to a tight interference fit between the outer cap 330 and the cap 280.

It should be noted that the claim does not exclude the existence of frangible portions in the device other

than between the outer sleeves, such as those provided in D13.

(v) The subject-matter of method claim 13 of the first auxiliary request does not involve an inventive step.

The skilled person when considering the teaching of D4 and wishing to form a sleeve that has two parts would automatically form the sleeve and then cut it into the two parts as this is the easiest way to form two parts. The skilled person would not have applied the whole teaching of D2 to the device known from D4, but only the fact that there are spacing means and the outer sleeve is in two separate parts. This is clear when the teaching of D5 is taken into consideration which shows a spacing means without all the other features that are present in the device disclosed in D2.

The same reasoning applies to the corresponding claims in the second, third and fourth auxiliary requests which each include this claim in their respective sets of claims.

(vi) The subject-matter of claim 1 of the fifth auxiliary request does not involve an inventive step.

D2 discloses a groove in the embodiment of figures 7 to 10 in the space formed between the skirt of the stopper cap and the lower circumferential edge and the bevel of the stopper cover. The circumferential edge of the first sleeve, i.e. band 32, is located in the groove as is shown in figure 8 and the circumferential edge of the second sleeve, i.e. the stopper cover 39, is located in the groove because it forms part of the

groove and hence by definition is located in the groove. The circumferential edges of the band and stopper cover are located adjacent one another. Therefore the application of the teaching of D2 to the device of D4 would also result in the provision of a groove.

Reasons for the Decision

1. Documents open to file inspection

1.1 With its grounds of appeal appellant/opponent I filed D14 which is a document concerning a global offering of shares in Guala Closures S.p.A. The document is marked as confidential on its front page. Appellant/opponent I also gave the internet address of the website from which it obtained the document. The address given by appellant/opponent I turned out to have an error in it.

In its response to the appeal of appellant/opponent I the appellant/proprietor requested that D14 be removed from the proceedings, that it be excluded from file inspection, and that all references thereto be deleted from the file, since it considered that it was a confidential document that should not be made available to the public.

Appellant/opponent I thereupon corrected the internet address of the website and filed a confirmation from a public notary that he had accessed the website via the internet and was able to print out documents D14 and the full version of D15a which is in the Italian

language and part of which corresponds essentially to D14.

The Board itself accessed the website at the corrected address and found that it could view the document D14 and print out a copy thereof.

The availability of D14 and D15a to an unrestricted public is not therefore in doubt. D15b is an excerpt from a document alleged by appellant/opponent I to be the English version of D15a. Proof of this allegation was not supplied by appellant/opponent I and it is not necessary to consider this document further in the present decision since its content is covered by D14 and D15a.

- 1.2 Article 128 EPC governs file inspection. Paragraph (4) of the article indicates that the inspection may be subject to restrictions laid down in the Implementing Regulations and Rule 144 EPC sets out these restrictions. The documents mentioned above do not fall under any of the categories set out in Rule 144 paragraphs (a) to (c) EPC so that it must be considered whether they could fall under paragraph (d) of this rule. Paragraph (d) indicates that the President of the European Patent Office may exclude from file inspection other documents which do not serve the purpose of informing the public about the European patent application or the European patent. Furthermore, in the Decision of the President of the European Patent Office dated 12 July 2007 (OJ 2007, Special edition 3, 125) regarding Rule 144(d) EPC it is stated in Article 1(2)(a) that a document shall be excluded from file inspection at the request of a party if the

inspection could be prejudicial to the legitimate personal or economic interests of legal or natural persons.

1.3 It is established that the documents were accessible to the public irrespective of any confidentiality statement on the document itself. Since the documents have been available to the public by one means, i.e. the internet, the economic interest of the appellant/proprietor cannot be affected by its being available by another means, i.e. file inspection. The documents are also relevant to the proceedings since they constitute evidence related to an alleged public prior use of a possibly relevant device. The documents therefore do not fall into the category set out in paragraph (d) of Rule 144 EPC so that there is no reason to exclude them from file inspection.

1.4 In accordance with Article 1(3) of said Decision of the President a document covered by Article 1(2)(a) thereof shall be provisionally excluded from file inspection until a final decision on the request has been taken. The provisional exclusion had been effected in the present case. The Board has now come to the conclusion that there is no basis for the exclusion from file inspection so that it can now take a final decision lifting the exclusion.

1.5 Also, the request of the appellant/proprietor that the documents be removed from the proceedings and references thereto deleted is refused. As explained above the documents are in the public domain so that there is no reason for any such action, irrespective of

whether or not the European Patent Convention would even allow such actions.

2. *Prior use*

2.1 The alleged prior use is based on D14, D15a and D15b as evidence that a closure assembly under the name "Alusnap" was launched or put on the market, i.e. at least offered for sale, before the priority date of the patent in suit. It is only necessary to discuss D14 as will become apparent below. D14 is a document dated November 2005 supporting an offer for the sale of shares in a company which has the name Guala Closures S.p.A.

In a table on page 71 of D14 a launch date of 2001 is indicated for a closure with the name "Alusnap". There is also a reference on this page to "Alusnap" being patent protected. The said table indicates the number of components in "Alusnap" as 6. On page 72 of the document there is a diagram of the closure.

In the patent in suit it is stated in column 2, lines 45 to 46 that "The Applicant has named the device of the invention "ALUSNAP" (Trade Mark)".

2.2 As part of the evaluation of the alleged prior use it must be considered what may have been prior used, i.e. what are the technical features of any prior used device. D14 has on page 72 a diagram of an "Alusnap closure". If this diagram is to be considered as evidence of the features of the prior used closure then it must be proven that the prior used closure is identical to that shown in this diagram.

Apart from the name "Alusnap" there is no link between the diagram on page 72 of D14 and the allegedly prior used closure. "Alusnap" is a trade mark (see column 2, lines 45 to 47 of the patent in suit). A trade mark is used to indicate the origin of goods or services and is not normally considered to be an indication of the technical features of a device with which it is associated. It is moreover normal for improvements to be made to a device without however changing its name or trade mark. In the present case both D1 (see page 3, lines 2 and 3) and the patent in suit (see above) indicate that the device disclosed therein is named "Alusnap", even though these documents disclose different devices. There is thus evidence that in the case of "Alusnap" the same name has been used for closures having differing technical features. It must therefore be concluded that this trade mark is not one which exceptionally could be considered to uniquely define the technical features of device with which it is associated.

In this respect the Board notes that the number of components of the device is given as six in the said table in D14 whereas the number of components in the devices according to the patent in suit and D1 could be considered to be different due to the first and second outer sleeves being separate in the device according to the patent in suit. Appellant/opponent I and respondent III gave differing answers concerning the number of components in the device according to D1. The Board concludes therefore that also this information given in D14 does not allow the device to be identified.

There is hence no evidence as to the technical features of the closure that is stated to have been launched in 2001. The closure could, for instance, have corresponded to the one disclosed in D4 which has the same applicant as for D1, or it could have been a still further closure having quite different features.

Not only is there no evidence that "Alusnap" is a unique name for a particular form of closure, there is evidence that it specifically is used for closures having varying technical features.

- 2.3 In this respect the Board also notes that it does not necessarily accept that the reference to a "launch date" in D14 or the other evidence relating to the circumstances and date of the alleged prior use is sufficient to prove that a prior use actually has taken place. The Board does not have to consider these matters since, as explained above, it does not consider that **what** might have been prior used has been proven.
- 2.4 The Board concludes therefore that the technical features of the allegedly prior used closure have not been proven.

Main request

3. Novelty
- 3.1 Appellant/opponent I and respondent III argued that D1 and D2 each took away the novelty of the subject-matter of claim 1.

3.2 Claim 1 of this request requires that that there is a second outer sleeve "separate from the first outer sleeve". D1 discloses first and second outer sleeve portions 10, 15. The first outer sleeve portion 10 is associated with the second outer sleeve portion 15 by means of a frangible portion 20 in the form of frangible links therebetween (see page 9, lines 24 to 26, and claim 1 of D1).

Appellant/opponent I argued that the skilled person would consider figure 4 of D1 as a stand-alone disclosure and conclude that the two portions 10, 15 must be separate since they are indicated with different reference numerals.

The Board cannot accept that the disclosure of the figures can be divorced from their description. In any case the separate indication of the portions does not have to mean that the portions are physically separate since the separate indication is consistent with the portions being connected by frangible links so that they will later become separate once these links are broken as is indicated in the description. The Board concludes therefore that the only disclosure in this respect in D1 is of two outer sleeve portions connected by frangible links.

Appellant/opponent I and respondent III both argued that the term "separate" as used in claim 1 of the request does not have to include physical separation. They argued that the breakable bridges of the device disclosed in D1 served to separate the two portions.

The Board cannot agree with appellant/opponent I and respondent III in this respect. The term "separate" normally means that the two portions are not connected, in particular not physically connected. This view is confirmed in the description of the patent, wherein in column 15, lines 51 to 58, it is stated that the term separate means that the portions are not connected together and in particular are not connected by a frangible break line. A frangible portion is one which connects two parts, but which is weaker than these parts such that the portion can be easily destroyed to separate the parts. Since the purpose of the frangible portion is to allow easy separation of the parts it cannot reasonably be argued that the parts were already separate even before the links were broken.

Therefore D1 does not disclose all the features of the assembly of claim 1 of this request.

3.3 With respect to D2 it was disputed by the appellant/proprietor that this document showed a first outer sleeve coaxially mounted over an inner sleeve that is provided with means for fixing it on the container and further that there is a second outer sleeve which is separate from the first outer sleeve and is a "substantially tight fit with a container closure member" as required by claim 1.

3.3.1 In D2 there is a band 32 which forms a first outer sleeve. This band is mounted over a tubular member 4 which has a portion thereof adjacent the band. This portion extends axially and thus forms a sleeve over which the band is mounted.

The claim further specifies that there are means for fixing the sleeve on the container. In the device disclosed in D2 the tubular member 4 is fixed on the container by this band 32 which also fixes the portion which forms a sleeve on the container so that there is a means for fixing the sleeve on the container.

3.3.2 It is not disclosed in D2 that the second outer sleeve is a "substantially tight fit" with the container closure member.

A "tight fit" implies that the second outer sleeve must be elastically deformed such that it exerts a pressure on the closure member. This pressure then leads to friction between the two bodies which inhibits relative movement therebetween. The qualification of the tight fit by the term "substantially" implies that the fit is not necessarily such as to exclude all relative movement, e.g. when a substantial force is exerted so that the friction is overcome.

In the device disclosed in D2 the stopper cover 39 corresponds to the second outer sleeve specified in the claim and the stopper 18 corresponds to the closure member specified in the claim. The stopper cover 39 is retained axially on the stopper by snap-engagement of interacting annular projections 40 and 41 (see page 2, lines 38 to 42) and rotationally by interacting teeth 42 and 43 (see page 2, lines 43 to 49). When retention is effected by interacting projections or teeth this retention is based on their shape or form. There is no need for any frictional interaction and hence no need for a tight fit. There is in fact no indication in the document that there is a tight fit.

Respondent III argued that a tight fit is visible in figure 8 of the document. Figure 8 does show part of the stopper cover 39 in contact with the stopper 18. However, there is nothing to indicate that the contact shown in the figure is of the type which would form a substantially tight fit. Figure 8 is an enlarged view of a detail of figure 7 (see page 1, lines 70, 71). In figure 7 the corresponding parts are clearly shown to be separated and not to be in contact. Moreover, it is to be expected that they are separated since they are kept apart by the presence of annular projections 40 and 41 which are on the inside of the stopper cover 39 and the outside of the stopper 18 respectively. The Board cannot agree therefore that the stopper cover is disclosed in D2 to be a substantially tight fit on the stopper.

The Board concludes therefore that the feature of claim 1 that the second outer sleeve is a substantially tight fit with the container closure member is not disclosed in D2.

3.4 Therefore, the subject-matter of claim 1 of this request is novel in the sense of Article 54 EPC.

4. *Inventive step*

4.1 Appellant/opponent I and respondent III principally argue taking D4 as the closest prior art document.

Starting from this document the assembly of claim 1 is distinguished by the features that:

(a) the second outer sleeve is separate from the first outer sleeve, and

(b) means are provided for spacing apart the initially adjacent portions of the first and second outer sleeves upon reclosure of the assembly after an initial opening of the container.

This was the view of the appellant/proprietor.

The appellant/opponent I and respondent III also agreed that feature (b) is not disclosed in D4. They considered however that feature (a) is disclosed in D4 because the first and second outer sleeves are disclosed as being connected by a frangible portion which they considered implies that they are separate. The Board does not accept this argument for the same reasons as it did not accept it with respect to the disclosure of D1 in assessing novelty (see point 4.2 above).

4.2 The problem to be solved is to facilitate the opening of the closure assembly and to improve the visibility of the evidence that it has been already opened. The fact that the first and second outer sleeves are separate means that there is no frangible portion which needs to be broken so that opening is facilitated. The spacing apart of the sleeves after reclosure is more easily visible than broken frangible connections since underlying parts of the closure assembly that were hidden by the sleeves before opening will be visible after reclosing. With the frangible connections it could be reclosed such that the broken parts of the frangible connections are realigned. In this realigned

position these parts could look as if they are still connected. This negative aspect of frangible connections is no longer present.

- 4.3 Appellant/opponent I and respondent III argued that the skilled person seeking solutions to these problems would find them in D2.

In the device according to D2 two forms of evidence of opening are provided. The first form comprises a frangible ring 49 which produces a noise on breaking. The second form comprises means for spacing apart the initially adjacent portions of the first and second outer sleeves upon reclosure of the assembly after an initial opening of the assembly. These means are in the form of the annular lip 35 of band 32 and the projection 26 of the skirt 20 of the stopper cap 18. The projection 26 lies radially inwardly of the lip before initial opening (see figure 8), but after the initial opening the opposing surfaces of the projection and lip abut axially (see figure 9) preventing them from returning to their initial overlapping positions. The stopper cover 39 is now held at a distance from the band 32, whereas before opening they were adjacent each other. The gap which is so formed is readily visible and is accentuated by a colour difference between the stopper, which is visible through the gap, and the stopper cover (see page 2, lines 33 to 37 and 126 to 130).

The skilled person is thus taught by D2 that a means for spacing apart the initially adjacent portions of the first and second outer sleeves upon reclosure of the assembly after an initial opening of the container

gives a more visible evidence of tampering. It is clear from D2 that the two forms of evidence of tampering are provided independently since their constructions are independent of each other and the types of evidence are different, i.e. acoustic and visible. The skilled person would therefore realise that he could provide the visible form of evidence without necessarily also providing the acoustic form.

The tamper-evidence means disclosed in D4 is also of the visible type so that the skilled person would replace this with the more visible tamper-evidence means taught in D2. This would mean the replacement of the frangible portion of the device of D4 with an arrangement whereby the cap 280 of D4 is arranged to be positioned radially inwardly of the outer sleeve 310 under spring tension so that after initial opening the lower lip of the cap would abut the upper lip of the outer sleeve 310 ensuring that the cap 280 is spaced apart from outer sleeve 310. There is clearly no difficulty for the skilled person to do this. Also, when the frangible portion as evidence of tampering is replaced by other visible tamper-evidence means there will be no need to have an initial connection between the outer sleeve and the cap so that these elements may be provided separately. There is no prejudice against such a separate arrangement of the outer sleeve and cap as this is also provided in the device of D13, as pointed out by both appellant/opponent I and respondent III.

- 4.4 Therefore, the subject-matter of claim 1 of the main request does not involve an inventive step in the sense of Article 56 EPC.

First, second, third and fourth auxiliary requests

5. *Inventive step*

5.1 Claim 13 of the first auxiliary request, claim 13 of the second auxiliary request, claim 1 of the third auxiliary request, and claim 1 of the fourth auxiliary request all have the same wording.

These claims specify a method of manufacturing a closure assembly having the same features as the closure assembly of claim 1 of the main request which has been found to be obvious (see point 4.4 above). It must therefore be considered whether the method steps specified for manufacturing the closure assembly are obvious for the skilled person in combination with the features of the device being manufactured.

5.2 Step (a) of the claimed method comprises providing an outer sleeve member. This feature is implicitly required for the closure assembly disclosed in D4 since that closure assembly has an outer sleeve member 310, 330. Since method step (a) is disclosed in D4 which has been taken as the nearest prior art document with respect to claim 1 of the main request it cannot contribute to the presence of an inventive step in the subject-matter of the claims under consideration.

5.3 Step (b) comprises providing a pouring outlet device and the sleeve adapted to be secured to a mouth and neck portion of a container for liquid and the container closure member releasably securable to the pouring outlet device and/or sleeve. In the assembly

known from D4 the sleeve 20 includes a pouring device (see page 11, lines 25 to 26). The cap 280 of the device is releasably secured to the sleeve 20 (see page 15, lines 17 to 19). The constructional features of the closure assembly specified in this feature are thus known from D4 and do not therefore contribute to the presence of an inventive step. The method step of providing the pouring outlet device is also implicitly disclosed in the document since the pouring outlet device disclosed in the assembly of D4 must have been provided. Therefore, also this step cannot contribute to the presence of an inventive step in the subject-matter of the claims under consideration.

5.4 Step (c) comprises disposing the pouring outlet device, sleeve and container closure member at least partly within the outer sleeve member. In the assembly known from D4 the pouring outlet device 55, sleeve 20 and container closure member 280 are at least partly within the outer sleeve member 310, 320 and hence must have been disposed into this location. Therefore, also this step cannot contribute to the presence of an inventive step in the subject-matter of the claims under consideration.

5.5 Step (d) comprises forming the outer sleeve member into the first outer sleeve and the separate second outer sleeve, by providing a circumferentially cut line which extends 360° around the closure assembly.

This feature is not disclosed in any of the cited documents. However, as argued by appellant/opponent I and respondent III it is clear to the skilled person that for a pair of tubular components which are to be

fitted close together one manner of making them is first to form a tube and then cut it to form the components. The appellant/proprietor did not indicate any unexpected advantage arising from providing this feature in the particular circumstances.

The appellant/proprietor argued that operations such as this could not be carried out with the device disclosed in D2 since its form could not result from a simple circumferential cut.

It overlooks, however, the fact that the skilled person would not take the whole construction of D2 and incorporate it in the assembly of D4. As already explained with respect to the main request (see point 4.3 above) when applying the teaching of D2 to the assembly as disclosed in D4 the skilled person would take the essential feature which leads to the greater evidence of tampering, i.e. the spacing apart of the two outer sleeves after initial opening, and incorporate this in the device disclosed in D4. The skilled person is then faced with the problem of providing the two parts 310 and 320 of D4 as separate entities since the frangible connection provided in the device of D4 is no longer necessary or desirable. There is nothing to suggest that first forming a suitable sleeve and then cutting it would not be an acceptable possibility to achieve this result.

5.6 Therefore, the subject-matter of each of claim 13 of the first auxiliary request, claim 13 of the second auxiliary request, claim 1 of the third auxiliary request, and claim 1 of the fourth auxiliary request,

does not involve an inventive step in the sense of Article 56 EPC.

- 5.7 As a consequence none of these requests is allowable and the appeal of the appellant/proprietor must therefore be dismissed.

Fifth auxiliary request (claims as maintained with the impugned decision)

6. *Inventive step*

- 6.1 The only independent claim of this request is claim 1 which includes, in comparison to claim 1 of the main request, the additional features whereby the container closure member includes a circumferential groove which further provides a circumferential lip portion located below and adjacent to the circumferential groove, in which the initially adjacent portions comprise adjacent respective circumferential edges of the first and second outer sleeves, wherein the first and second circumferential edges are, prior to initial opening, located in the circumferential groove substantially adjacent one another.

- 6.2 According to the appellant/proprietor the problem to be solved by these additional features is to provide a support for the adjacent circumferential edges of the first and second outer sleeves when they are being formed by cutting an initially unitary outer sleeve into two separate parts.

The Board agrees that this is the problem to be solved and that it actually is solved by these features. It is

evident that as a cutting edge of a cutting implement presses radially inwardly on the initially unitary outer sleeve in the act of forming the first and second outer sleeves it will deform the sleeve inwardly so that the sleeve is supported by the respective sidewalls of the groove. This support will enable a straighter and cleaner edge to be formed since it will naturally follow the groove. The argument of the appellant/opponent I that there is no effect from the features is therefore not correct.

- 6.3 Appellant/opponent I argued that the skilled person would take into consideration D5 in this respect. In the device known from D5 the circumferential lips of sleeve 11 and outer cap 4, i.e. the first and second outer sleeves, are located adjacent one another. The inner cap 5 has a collar 30 (see figure 2) formed by a thickening on the outside of the lip of the cap. Appellant/opponent I argues that the transition area from this collar to the rest of the inner cap forms a recess and that a recess is a form of groove.

The Board cannot agree with the arguments of appellant/opponent I in this respect. Whether or not the collar 30 forms a recess is not relevant just as it is not relevant whether a recess can be termed a groove. What is relevant is whether D5 discloses a groove, in particular whether the transitional area from the collar 30 to the rest of the inner cap can be considered to form a groove. Taking into consideration both its form and function the transitional area cannot be considered to constitute a groove.

A groove is normally an elongate depression in a surface which thereby forms two sidewalls. The collar 30 could be considered to form one sidewall. There is, however, no second sidewall so that from its form it cannot be considered to be that of a groove.

It also cannot function as a groove. The two sidewalls of a groove allow an object or objects to be located and kept within the groove, e.g. the circumferential edges of the first and second sleeves, which is not the case if there is only one sidewall. This locating possibility also means that there is a functional effect since the location between the sidewalls allows the sidewalls to interact with the circumferential edges. In the case of the device disclosed in D5 the collar 30 is not intended to provide the function of a groove, but rather it is provided so that it can interact with a recess 31 formed in the sleeve 11. Thus, the transition area adjacent the collar 30 of the device known D5 also cannot functionally be considered to act as a groove. It would also not supply the effects of the second sidewall which can support the edge of the sleeve during a cutting operation.

- 6.4 Respondent III argued that this feature is disclosed in D2. In particular, it argued that a groove is present in the device of the embodiment of figures 7 to 10 in the space formed between the skirt 20 of stopper cap 18 and the lower circumferential edge and the bevel 44 of the stopper cover 39. Respondent III further argued that the circumferential edge 37 of the first sleeve, i.e. band 32, is located in the groove, as is shown in particular in figure 8 and that the circumferential edge of the second sleeve, i.e. stopper cover 39, is

located in the groove because it forms part of the groove and thus by definition is located in the groove. Respondent III furthermore pointed out that these circumferential edges are located adjacent one another.

The Board cannot agree with this argument. The circumferential edge of the stopper cover cannot simultaneously form approximately half of the groove and at the same time be considered to be located in the thus formed groove. A location in a groove implies being within the sidewalls of the groove. A sidewall cannot itself be within the sidewalls.

6.5 Therefore, the subject-matter of claim 1 of the fifth auxiliary request, i.e. the patent as maintained in accordance with the decision of the opposition division, involves an inventive step in the sense of Article 56 EPC.

6.6 The fifth auxiliary request is therefore allowable so that the appeal of the appellant/opponent I must be dismissed.

Order

For these reasons it is decided that:

1. The appeals are dismissed.
2. All documents of the present appeal proceedings are open to file inspection.

The Registrar:

The Chairman:

G. Nachtigall

H. Meinders